Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,

No. 80-1975

In the Supreme Court of the United States

October Term, 1981

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.,
Petitioners,

vs.

JONEZ P. SUTHOFF, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

1. Was the federal district court without jurisdiction conferred by the Congress to decide the case, on the face of the complaint, under the stringent test enunciated by *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946), where the complaint is so drawn as to seek recovery directly under the Constitution and laws of the United States, and where the federal question clearly appears material and the claim is wholly substantial and not frivolous?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1
STATEMENT OF THE CASE 2
REASONS WHY THE WRIT SHOULD BE DENIED 4
CONCLUSION 8

Cases Cited

Amen v. City of Dearborn, 532 F. 2d 554, 556, 558-559 5
Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) 4, 7
Beistline v. City of San Diego, 256 F. 2d 421 (9th Cir. 1958) 7
Bell v. Hood, 327 U.S. 678, 681-82, 66 S. Ct. 773, 776, 90 L. Ed. 939 ..... 1, 3
Chacon v. Granata, 515 F. 2d 922, 924, fn 3 (5th Cir. 1975) 5
Dohany v. Rogers, 281 U.S. 362 6
Duke Power Co. v. Carolina Env. Study GP, 438 U.S. 59, 69, 70-71 (1978) 5
Foster v. Herley, 330 F. 2d 87 (6th Cir. 1964) 5
Goldblatt v. Hempstead, 369 U.S. 590 6
Lynch v. Household Finance Corp., 405 U.S. 538 7
Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 4
Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al., 637 F. 2d 337, rehearing denied 642 F. 2d 822 (5th Cir. 1981) 1, 4, 7, 8
Thomas W. Garland, Inc. v. City of St. Louis, 596 F. 2d 784 (8th Cir. 1979) 5

Warrington Sewer Company v. Tracey, 463 F. 2d 771 (3d Cir. 1972) 7, 8
West v. Chesapeake & P. Tel. Co., 295 U.S. 662 6
Williams v. Kelly, 624 F. 2d 695, 697 (5th Cir. 1980) 4

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States (Fifth Amendment) 4, 5, 6
Constitution of the United States (Fourteenth Amendment) 4, 5, 6
28 U.S.C. §§ 1331 and 1343(3) 5
42 U.S.C. § 1983 ..... 3, 4, 7

No. 80-1975

In the Supreme Court of the United States

October Term, 1981

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.,
Petitioners,

VS.

JONEZ P. SUTHOFF, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Jonez P. Suthoff, Frances Miller and Inez Philibert, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinions in this case. The opinions are reported in 637 F. 2d 337 (1981) and 642 F. 2d 822 (1981).

STATEMENT OF THE CASE

The respondents brought an "inverse condemnation" action in the federal district court against five public agencies of Mississippi and five individuals. The complaint charges with specificity that the petitioners entered into a conspiracy to force the respondents to sell their private property at one-fourth its value to Yazoo County so that the property could be used for public purposes by the Yazoo County Port Commission and the Yazoo County Industrial Development Corporation. The latter two public agencies did not have expropriation powers.

The complaint alleged that Yazoo City was induced to institute proceedings in the county court to expropriate 82.43 acres of the 122 acre tract of the plaintiffs' property falsely claiming that the portion was to be used for sewerage disposal. The complaint alleges that the true and sole purpose was to coerce the plaintiffs into selling their property at a fraction of its value to the county. The pleading alleges that Yazoo City never had any intent to acquire the property for the announced purpose. In fact the city dismissed the expropriation proceedings when it had served its coercive purpose.

It was alleged in the complaint that Yazoo County "took" 22.75 acres for which no compensation was paid; and that 99.25 acres were "taken" without just compensation. By the coercive tactics the petitioners forced the private landowners to sell their property at a price which was only one-fourth of its real value. Respondents charged in the complaint that 122 acres of their private property were wrongfully "taken" from them by Yazoo County for public use without just compensation in violation of Amendments V and XIV of the Constitution of the United

States, and they were denied due process and the equal protection of the law.

In specific allegations the complaint sets forth that certain public officials and private persons conspired to misuse the expropriation powers of Yazoo City by the municipality's institution of eminent domain proceedings with no intent to actually condemn, but solely in order to coerce the private landowners to sell their private property at a price far below the actual value to conspirator entities who were not parties to the condemnation proceedings. Such allegations are sufficient to state a claim under 42 U.S.C. § 1983 for deprivation under color of state law of individual federal constitutional rights. The allegations of the complaint are drawn so as to seek recovery under the federal constitution and a federal statute. Clearly the allegations support federal subject matter jurisdiction absent a finding that the claims are immaterial or frivolous.

The allegations of the complaint also support a state remedy based on fraud and deceit. Under *Bell v. Hood*, 327 U.S. at 681, federal jurisdiction must be sustained, if construed in the light of the purposes of the respondents in their pleadings their claim is based upon the federal constitution and upon a federal statute, regardless of whether the complaint also alleges a state cause of action.

The allegations of the complaint makes it very clear that the respondents seek recovery squarely on the ground that the petitioners violated the Fifth and Fourteenth Amendments. The complaint charges that the petitioners conspired and acted in concert to do acts prohibited by these amendments, and that the petitioners' conduct pursuant to the conspiracy resulted in damages greatly in excess of $10,000.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision of the Fifth Circuit Court of Appeals does not conflict with the decision of this court in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), nor is there a conflict with *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

Petitioners argue that the decision in the Fifth Circuit Court of Appeals conflicts with decisions of the Court in *Paul v. Davis* and *Baker v. McCollan*.

Paul v. Davis is not applicable to petitioners' claim. The respondent, in *Paul*, pointed to no specific constitutional guaranty safeguarding the interest which Davis asserted had been invaded. 424 U.S. at 700. In *Suthoff, et al.*, the respondents point to Amendments V and XIV. The respondents charge that their private property was taken for public use without just compensation and that the deprivation was also without due process of law. As a predicate to the contention that a tort committed by a state agent, without more, does not afford a basis for a federal § 1983 action, the petitioners assert there was no "taking" for Fifth Amendment purpose because, they say, that respondents "voluntarily" sold their property.

The coercive fraud and deceit practiced by the petitioners on the respondents was accomplished by an abuse of governmental power so gross as to be sufficient " 'to raise an ordinary tort by a government agent to the stature of a violation of the constitution.' " *Williams v. Kelly*, 624 F. 2d 695, 697 (5th Cir. 1980). For purposes of maintaining federal jurisdiction Yazoo City's arbitrary and wrongful misuse of instituted but abandoned state-law expropriation proceedings adequately states a claim of deprivation of property without due process of law in violation of the

federal constitution. *Foster v. Herley*, 330 F. 2d 87 (6th Cir. 1964). See also *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F. 2d 784 (8th Cir. 1979); cf., *Chacon v. Granata*, 515 F. 2d 922, 924, fn 3 (5th Cir. 1975).

Political subdivisions and public agencies such as the petitioners may be sued directly for Fourteenth Amendment violations under 28 U.S.C. §§ 1331 and 1343(3). *Amen v. City of Dearborn*, 532 F. 2d 554, 556, 558-559. The taking of plaintiffs' property without assurance of just compensation is such a "taking" claim as will support federal jurisdiction under 28 U.S.C. § 1331(a). *Duke Power Co. v. Carolina Env. Study GP*, 438 U.S. 59, 69, 70-71 (1978).

The Fifth Amendment to the Constitution of the United States prevents the federal government or its agencies from depriving the plaintiffs of their property without due process of law. The Fourteenth Amendment prevents any action by Mississippi or its political subdivisions which would accomplish such deprivation. The right to acquire, keep and enjoy property is a fundamental right and the protection of this fundamental right is one of the most important objects of government. The constitutionally protected right of property is subject to limitation by means of the *legitimate* exercise of the police power of the state. The word "property" under the Fourteenth Amendment embraces all valuable interests of the plaintiffs, and it includes the right to acquire, use, keep, dispose of and enjoy in ways consistent with the equal rights of others.

"Deprivation" is not defined as it is used in the Fourteenth Amendment. It is certain that "deprivation" includes the taking of approximately 22.75 acres of plaintiffs' private property for which no payment of any kind was made and the failure to pay adequately for the re-

maining 99.25 acreage which was acquired by fraud, deceit and coercion from the plaintiffs who were coerced against their collective wills into conveying the property to Yazoo County. It is well settled as a rule of federal constitutional law that plaintiffs' private lands cannot be "taken" in any manner for public use without just compensation being made to them. It is equally as a well settled principle of federal constitutional law that their property cannot be "taken" for public use without adequate compensation. *West v. Chesapeake & P. Tel. Co.*, 295 U.S. 662.

"Constitutional proportions" in this civil action are reached because the Fifth Amendment requires the federal government to pay for all property taken; and in addition also to pay the "just" compensation due thereon. The Fourteenth Amendment places the same requirements on the defendant public bodies of Yazoo County and upon the individual defendants when acting in concert with governmental entities. The *coerced* taking of the approximately 22.75 acres without any payment therefor, and the failure to pay "just compensation" or the actual value of 99.25 acres is violative of the United States Constitution as "taking" without adequate compensation and it is also a violation of federal constitutional requirement of due process of law. *Dohany v. Rogers*, 281 U.S. 362.

The acts of the local governmental entities in taking private property for purported public use are the proper concern of the federal courts. *Goldblatt v. Hempstead*, 369 U.S. 590. Among the civil rights intended to be protected from unlawful and discriminatory state action by the Fourteenth Amendment are the rights of the plaintiffs to acquire, enjoy, own and dispose of their property. Rights in property are basic civil rights. The right to enjoy their property without Yazoo City unlawfully and

fraudulently coercing them to give away a portion of their property, and to accept inadequate compensation for the remainder is no less a federal constitutional right than the right to speak freely or the right to travel unmolested. The respondents' rights relative to their property are personal rights which rise to federal constitutional proportions. *Lynch v. Household Finance Corp.*, 405 U.S. 538.

The decision of the Supreme Court in *Baker v. McCollan*, cited supra, is not applicable to the issues in respondents' case. McCollan failed to satisfy § 1983's threshold requirement that he was deprived of a right "secured by the Constitution and laws," and hence he had no claim cognizable under § 1983. Section 1983 imposes liability for violation of rights protected by the Constitution of the United States.

2. The decision of the Fifth Circuit Court of Appeals likewise does not conflict with the decisions of any other circuits. There is no conflict in *Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al.*, 637 F. 2d 337, rehearing denied 642 F. 2d 822 (5th Cir. 1981) with *Beistline v. City of San Diego*, 256 F. 2d 421 (9th Cir. 1958) and *Warrington Sewer Company v. Tracey*, 463 F. 2d 771 (3d Cir. 1972).

Beistline and *Warrington* are distinguishable from *Suthoff, et al.* In neither *Beistline* nor *Warrington* did the property owners allege that the expropriating bodies misused their coercive powers by instituting condemnation proceedings in order to force down the price for the benefit of non-parties without the condemnor having any intention to expropriate the land for public use. In *Beistline* the court said no federal claim arises out of the forced sale of property because of the *coercive but valid exercise* of expropriation power by a state agency authorized to

take the property. Likewise, the court said in *Warrington* that no federal claim is present where the governmental coercion is not shown to have its basis in the violation of a federal constitutional right. In *Suthoff, et al.* the misuse of the threat of the expropriation power forced the respondents to sell their private properties to entities not empowered nor entitled to take the land by eminent domain. The complaint in *Suthoff, et al.* stated a valid federal claim because of the violation by petitioners of respondents' constitutional rights.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
Counsel for Respondents